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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/092,796	03/07/2002	Jonathan D. Smith	RBC-101US	3409
24314 7590 04/05/2007 JANSSON SHUPE & MUNGER LTD. 245 MAIN STREET RACINE, WI 53403			EXAMINER GELLNER, JEFFREY L	
			ART UNIT	PAPER NUMBER
			3643	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/05/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/092,796

Applicant(s)

SMITH, JONATHAN D.

Examiner

Jeffrey L. Gellner

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 December 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3,5,6,10-19,55-61,63,67-72,74,76,77 and 81-89 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3,5,6,10-19,55-61,63,67-72,74,76,77 and 81-89 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3, 5, 6, 10-19, 55-61, 63, 67-72, 74, 76, 77, and 81-89 are rejected under 35 U.S.C.

103(a) as being unpatentable over Devlin et al. (1967, *Physiologia Plantarum* 22: 587-592) in view of Doughty (1962, *Proc. Amer. Soc. Hort. Sci.* 80: 340-349).

As to claims 1, 3, 5, 6, 10, 56, 63, 67, 70, Devlin et al. discloses a method of commercially growing miniature cranberries (from page 592, last para., where use of Gibrel in commercial production) comprising applying to cranberry plants a composition consisting essentially of aqueous gibberellin (from "treated with GA only" of page 588, 2nd para. in "Materials and Method") in an amount such that most of the cranberries have a mature mass of less than 0.6 grams (from "0.37" grams of "Weight/berry" from Table 1, page 589). Not disclosed is the applying during the mid-bloom period. Doughty, however, discloses the application of growth regulators during mid-bloom (from "65 to 80% full bloom" of 1st para. of "Materials and Methods" of page 341). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method of Devlin et al. by applying at mid-bloom as disclosed by Doughty so as to affect the greatest number of blossoms (from 1st para. of "Discussion" of page 346 of Doughty).

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As to claims 11-13, 68, 69, the limitations of claims 1 and 56 are disclosed and described above. Not disclosed are specific concentrations of GA. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the method of Devlin et al. as modified by Doughty by applying a specific concentration of GA so as to achieve a specific goal of fruit size since these limitations are commonly known variables that growers routinely manipulate.

As to claims 14 and 60, Devlin et al. as modified by Doughty further disclose fruit set of at least 80% (“87.3%” fruit set of Table 1, page 589, of Devlin et al.).

As to claims 15 and 61, the limitations of claims 1 and 56 are disclosed as described above. Not disclosed is the fruit set of at least 90%. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the method of Devlin et al. as modified by Doughty by having a fruit set of at least 90% depending upon variety and weather conditions.

As to claims 16, 17, 57, and 58, Devlin et al. as modified by Doughty further disclose the cranberries having masses of about 0.2 to 0.6 or 0.3 to 0.5 grams ((from “0.37” grams of “Weight/berry” from Table 1, page 589).

As to claim 18, Devlin et al. as modified by Doughty further disclose application by spraying (“aqueous sprays” of page 588, 1st para. in “Materials and Method” of Devlin et al.).

As to claim 19, the limitations of claim 1 are disclosed as described above. Not disclosed is the application by ground-drive equipment. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the method of Devlin et al. as

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modified by Doughty by using ground-drive equipment as a well known efficient means of applying agricultural sprays.

As to claims 55 and 59, Devlin et al. as modified by Doughty further disclose the cranberries having masses less than about 0.75 grams ((from “0.37” grams of “Weight/berry” from Table 1, page 589).

As to claim 71, Devlin et al. discloses a method of commercially growing miniature cranberries (from page 592, last para., where use of Gibrel in commercial production) comprising applying to cranberry plants a composition consisting essentially of aqueous gibberellin (from “treated with GA only” of page 588, 2nd para. in “Materials and Method”) in an amount such that most of the cranberries have a fruit set of at least 80% (“87.3%” fruit set of Table 1, page 589) and a mature mass of less than 0.6 grams (from “0.37” grams of “Weight/berry” from Table 1, page 589). Not disclosed is the applying during the mid-bloom period. Doughty, however, discloses the application of growth regulators during mid-bloom (from “65 to 80% full bloom” of 1st para. of “Materials and Methods” of page 341). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method of Devlin et al. by applying at mid-bloom as disclosed by Doughty so as to affect the greatest number of blossoms (from 1st para. of “Discussion” of page 346 of Doughty).

As to claims 72, 74, 76, 77, 81, Devlin et al. discloses a method of commercially growing miniature cranberries (from page 592, last para., where use of Gibrel in commercial production) comprising applying to cranberry plants a composition consisting essentially of aqueous

gibberellin (from “treated with GA only” of page 588, 2nd para. in “Materials and Method”) in an amount such that the plants have a fruit set of at least 80% (“87.3%” fruit set of Table 1, page 589). Not disclosed is the applying during the mid-bloom period. Doughty, however, discloses the application of growth regulators during mid-bloom (from “65 to 80% full bloom” of 1st para. of “Materials and Methods” of page 341). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method of Devlin et al. by applying at mid-bloom as disclosed by Doughty so as to affect the greatest number of blossoms (from 1st para. of “Discussion” of page 346 of Doughty).

As to claims 82-84, the limitations of claim 72 are disclosed and described above. Not disclosed are specific concentrations of GA. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the method of Devlin et al. as modified by Doughty by applying a specific concentration of GA so as to achieve a specific goal of fruit size since these limitations are commonly known variables that growers routinely manipulate.

As to claim 85, the limitations of claims 72 are disclosed as described above. Not disclosed is the fruit set of at least 90%. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the method of Devlin et al. as modified by Doughty by having a fruit set of at least 90% depending upon variety and weather conditions.

As to claims 86 and 87, Devlin et al. as modified by Doughty further disclose the cranberries having masses of about 0.2 to 0.6 or 0.3 to 0.5 grams ((from “0.37” grams of “Weight/berry” from Table 1, page 589).

As to claim 88, Devlin et al. as modified by Doughty further disclose application by spraying (“aqueous sprays” of page 588, 1st para. in “Materials and Method” of Devlin et al.).

As to claim 89, the limitations of claim 1 are disclosed as described above. Not disclosed is the application by ground-drive equipment. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the method of Devlin et al. as modified by Doughty by using ground-drive equipment as a well known efficient means of applying agricultural sprays.

Response to Arguments

Applicant's arguments filed 8 December 2006 have been fully considered but they are not persuasive. Applicant's arguments are: (1) the great commercial success of cranberries grown according to the instant invention clearly demonstrates the non-obvious nature of the invention (Remarks page 8, last para.); and, (2) the references used in rejections had the goal of achieving high fruit sets with large berries and hence teaches away from the instant invention (Remarks last para. of page 8 continuing to page 9).

As to argument (1), data must be presented to demonstrate commercial success (see MPEP 716.03).

As to argument (2), the goal of the prior art is not dispositive of their use. See MPEP 2123(I) for proposition that “[t]he use of patents as references is not limited to what the patentees describe as their invention or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain” (citing *In re Heck*).

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Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Eck discloses in the prior art information about cranberry fruit set and development.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey L. Gellner whose telephone number is 571.272.6887. The examiner can normally be reached on Monday-Friday, 8:30-4:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon can be reached on 571.272.6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

A handwritten signature in black ink, appearing to read 'J. L. Gellner', is written over a horizontal line.

Jeffrey L. Gellner
Primary Examiner
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